86-745

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF VERMONT
DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES,
Petitioner

v.

UNITED STATES HEALTH
AND HUMAN SERVICES AGENCY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly deprived Vermont of the right to judicial review of fairly raised legal arguments.
2. Whether petitioner is entitled to reversal or remand of the Court of Appeals' decision on statutory grounds or as a result of procedural deficiencies associated with respondent's administrative determination.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are as listed in the caption of the case except that the Children's Defense Fund, a children's advocacy group, filed a brief as an amicus-curiae with the Court of Appeals.

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UNITED STATES HEALTH
AND HUMAN SERVICES AGENCY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of Vermont Department of Social and Rehabilitation Services hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on August 12, 1986 (Petition for Rehearing denied September 25, 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth in the Appendix at pages 3a-17a. The decision of the Second Circuit on the Petition for Rehearing is set forth in the Appendix at page 1a-2a.

The opinion and order of the United States District Court for the District of Vermont is printed in the Appendix at pages 20a-32a. The Judgment of the District Court is printed in the Appendix at page 18a-19a. The decision of the Department of Health and Human Services Departmental Grant Appeals Board is printed in the Appendix at pages 33a-45a.

JURISDICTION

The Second Circuit's Judgment was entered on August 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, 2101(c), and 2106.

STATUTES INVOLVED

The principal statutes involved herein are the federal Administrative Procedures Act, 5 U.S.C. § 553, 701-706 and the Adoption Assistance and Child Welfare Act of 1980, particularly sections 42 U.S.C. § 627, 675(5)(C).

Portions of Vermont's Juvenile Proceedings Statutes, Title 33, Vermont Statutes Annotated, § 658 (as it existed in fiscal year 1981) and § 659 and portions of Vermont's Adoption Statutes, Title 15 V.S.A. § 640-642 are also relevant.

Jurisdictionally, the applicable statutes are: 28 U.S.C. § 1254, 1331, 2101, 2106.

The above-stated statutes are reproduced verbatim in the Appendix.

STATEMENT OF THE CASE

The petitioner, the State of Vermont Department of Social and Rehabilitation Services (hereinafter Vermont) seeks the review of this Court to redress federal agency action which offends fundamental notions of fairness and ignores long-followed case principles established by this Court and generally followed in the lower courts.

The dispute between the parties to this action involves Vermont's entitlement to $346,872 in fiscal year 1981 federal foster care and children's services funds awarded pursuant to the Adoption Assistance and Child Welfare Act of 1980. The respondent, United States Health and Human Services Agency (hereinafter HHS), found Vermont ineligible for the funds in dispute by letter of August 12, 1983 for an alleged failure to provide hearings for children in state custody as required by 42 U.S.C. § 675(5)(C). HHS's Departmental Grant Appeals Board (hereinafter GAB) upheld the agency action by a written decision reached on June 27, 1984. *State of Vermont Department of Social and Rehabilitation Services v. U. S. Department of Health and Human Services*, (D. Vt. 1985), App., pp. 25a-26a. Vermont appealed the GAB decision to the United States District Court for the District of Vermont, alleging a right to the funds on statutory grounds or, in the alternative, a right to reversal on grounds of discrimination, estoppel, and/or the allegation that HHS's action represented an ex post facto reversal of a prior finding of eligibility without providing Vermont an opportunity to voluntarily comply with HHS's revised interpretation.

On August 28, 1985, the District Court, claiming jurisdiction under 5 U.S.C. § 701-706 and 28 U.S.C. § 1331, found Vermont eligible for the disputed funds on statutory grounds and, as a result, deemed it unnecessary to reach Vermont's equitable arguments. *Id.*, pp. 26a, 30a. HHS appealed this decision to the Second Circuit Court of Appeals. On August 12, 1986, a three-judge panel from the Second Circuit reversed the District Court, again on statutory grounds. The Second Circuit refused to reach Vermont's equitable arguments and refused to allow the District Court to reach these arguments on remand. Instead, the panel remanded the case to the District Court with instructions to enter an order affirming the GAB decision. *HHS v. Vermont* (2d Cir. 1986), App. p. 17a.

The Second Circuit decision incorrectly interprets the applicable statute, deprives Vermont of the right to judicial review of its fairly raised equitable arguments, and ignores fundamental fairness guarantees established by the federal Administrative Procedures Act and further developed by this Court.

The Adoption Assistance and Child Welfare Act of 1980 (hereinafter The Act) provides fiscal rewards to states which adopt procedures designed to more quickly establish permanent families for abused and neglected children. Abused and neglected children are generally placed in foster care for temporary protection and nurturing. The Act seeks to speed up either the process of family reunification or, in the alternative, the process of termination of parental rights for purposes of adoption by requiring implementation of numerous systems and procedures to monitor individual cases so as to prevent the cases from stagnating due to inattention. 42 U.S.C. § 627 of the Act rewards those states which meet the above-described systematic requirements with extra funds for various family reunification and children's services. *See*, District Court Decision, App., pp. 20a-24a.

Congress designated HHS as the agency to determine eligibility for these funds. The first year in which the funds were offered was fiscal year 1981. The Record of this case demonstrates that HHS reviewed Vermont's certification of eligibility, approved Vermont's systems and procedures including Vermont's hearing procedures, and awarded Vermont the $346,872 in incentive funds prior to the close of fiscal year 1981. The Record further shows that Vermont reasonably believed that this award of funds constituted a final determination of Vermont's eligibility for this fiscal period, and in reliance on HHS's review of its systems and procedures, Vermont reasonably assumed that its hearing procedures, as changed to meet concerns raised by HHS during the review, met the requirements of The Act to HHS's satisfaction.

The Record further shows that approximately six months after the close of fiscal year 1981, HHS announced that a second review for fiscal year 1981 would be held and, following the review, HHS revoked Vermont's fiscal year 1981 eligibility based on the alleged failure of Vermont's hearing procedures to meet the requirements of The Act.

The Record further shows that HHS's ex post facto reversal of its prior eligibility decision was made without providing Vermont with any opportunity to take corrective action and without any prior regulations or other written guidance specifying HHS's revised standards of eligibility. *See*, District Court Decision, App., pp. 24a-25a. Furthermore, the Record demonstrates, with voluminous and essentially unrebutted evidence, that HHS discriminated against Vermont by finding Vermont ineligible for fiscal year 1981 incentive funds based on hearing procedures identical to those in over twenty states which were found eligible for the same period. *See*, GAB Decision, App., pp. 41a-43a.

REASONS FOR GRANTING THE WRIT

A. Deprivation of Review

This is an important case calling for the exercise of this Court's power of supervision, because the Court of Appeals' decision departs from the accepted and usual course of judicial proceedings by depriving Vermont of judicial review of fairly raised equitable arguments and by imposing statutory standards on Vermont which are, at best, ambiguous. By prohibiting review of Vermont's equitable arguments, the Court of Appeals has effectively insulated HHS's eligibility determination procedures from the procedural protections mandated by the federal Administrative Procedures Act and prior decisions of this Court. Furthermore, the Second Circuit's refusal to allow consideration of Vermont's equitable arguments places the Second Circuit in conflict with the decisions of

other Circuits with respect to the scope of judicial review to be applied to ex post facto and discriminatory federal agency action and the right to receive judicial consideration of all issues fairly raised.

The federal APA was enacted in 1946 to provide citizens and institutions with procedural protections designed to protect against unjust treatment by federal agencies. *See* S. Rep. No. 752 79th Cong., 1st Sess., 12-13 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21-23 (1946); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-41, 70 S. Ct. 445, 94 L. Ed. 616 (1950). Some of the principal rights provided by the APA include the right to prior notice and an opportunity to comment on the standards to be used in agency decision making, 5 U.S.C. § 553; the right to comprehensive judicial review of federal agency decisions, 5 U.S.C. § 704-706; and the right to reversal of agency actions which violate fundamental principals of justice set forth in 5 U.S.C. § 706(2)(A)-(F).

The Second Circuit's refusal to decide or allow remand for a decision on Vermont's equitable arguments violates Vermont's right under 5 U.S.C. § 706 to judicial review of "all relevant questions of law" fairly raised "to the extent necessary to decision." Consideration of Vermont's equitable arguments is necessary to a decision in this federal grant dispute, because the equitable arguments are clearly alternative arguments which do not depend on Vermont's strict statutory compliance with the Act, as retroactively interpreted by HHS, as a prerequisite to relief. By refusing to allow judicial examination of Vermont's equitable arguments, the Second Circuit has deprived Vermont of a judicial forum to determine whether HHS's ex post facto ineligibility determination violated Vermont's procedural rights to notice and entitled Vermont to reversal of HHS's action pursuant to 5 U.S.C. § 706(2)(D). (Right to reversal of federal agency actions which fail to observe procedure required by law.)

See also, 5 U.S.C. § 553 (federal agencies must formally promulgate regulations when establishing standards or interpretations which affect the substantive rights of affected parties). Furthermore, the Second Circuit's decision deprived Vermont of judicial consideration of the validity of its discrimination allegations and the consequent right to reversal of HHS's action as either arbitrary, 5 U.S.C. 706(2)(A), or unsuppported by substantial evidence, 5 U.S.C. 706(2)(E). In addition, the Second Circuit decision deprived Vermont of judicial consideration of Vermont's right to relief under the common law theory of estoppel and the consequent right to reversal pursuant to the prohibition against federal agency action "otherwise not in accordance with law" contained in 5 U.S.C. § 706(2)(A).

Besides violating APA guarantees, the Second Circuit's refusal to provide for consideraiton of Vermont's equitable arguments departs from the accepted course of judicial proceedings in this Court and the Courts of Appeals. Where a petitioner wins relief in a lower court based on a particular ground and that ground for relief is reversed on appeal, but where other fairly raised theories of relief which could entitle petitioner to prevail remain undecided, then the Appellate Court should either remand the case or directly decide the outstanding issues. *Department of State v. Washington Post Co.*, 456 U.S. 595, 603, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982); *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 210, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982); *Foster v. Dravo Corporation*, 420 U.S. 92, 95 S. Ct. 879, 885, 43 L. Ed. 2d 44 (1975); *Brotherhood of Locomotive Engineers v. Chicago R.I. & P.R. Co.*, 382 U.S. 423, 437-438, 86 S. Ct., 594, 15 L. Ed. 2d 501 (1968); *Osborne v. Folmar*, 735 F.2d 1316, 1318 (11th Cir. 1984); *Hettleman v. Bergland*, 642 F.2d 63, 67-68 (4th Cir. 1981); *Connolly v. Pension Benefit Guaranty Corporation*, 581 F.2d 729, 734-735 (9th Cir. 1978); *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17, 25 (5th Cir. 1965); *Maxwell v. United States*,

344 F.2d 181, 184 (5th Cir. 1964). In a more general sense, on at least two separate occasions, this Court has warned against the ill of granting excessive deference to administrative agencies when said agencies are acting in violation of statutory mandates and Congressional policy. *Volkswagonwerk Aktiem v. Federal Maritime Commission*, 390 U.S. 261, 88 S. Ct. 929, 935, 19 L. Ed. 2d 1090 (1968); *American Shipbuilding Company v. NLRB*, 380 U.S. 300, 318, 85 S. Ct. 955, 967, 19 L. Ed. 2d 1090 (1965).

The Second Circuit's refusal to give any consideration to the retroactive nature of HHS's ineligibility action violates principles that this Court established in 1947 that still stand today. In *Securities Comm'n v. Chenery*, 332 U.S. 194, 203, 67 S. Ct. 1575, 91 L.Ed. 1995 (1947), this Court proclaimed that, where a federal agency retroactively applies a revised standard which deprives an aggrieved party of a federal benefit, the federal agency action will not stand unless the federal agency can demonstrate good reason for its failure to follow the APA's prior notice requirements and those reasons outweigh the injustice the retroactive nature of the agency action brings upon the aggrieved party. *See* also, *Morton v. Ruiz*, 415 U.S. 199, 230-237, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) (Agency failed to provide good reason why prior notice of a change in an agency interpretation could not be given, and therefore the agency action was reversed, cf. *Securities Comm'n v. Chenery, supra*). And *see, Bell v. New Jersey*, 461 U.S. 773, 794, 103 S. Ct. 2187, 2199, 76 L. Ed. 2d 312 (1983). (White, J., concurring—questioning the right of a federal agency to recover funds based on a revised statutory interpretation where a state had relied upon a previous agency interpretation.)

The *Securities Comm'n* balancing test does not require the aggrieved party to achieve strict statutory compliance in order to qualify for the benefit or entitlement in issue.

Instead, the *Securities Comm'n* case mandates that retroactive agency action expands the scope of judicial review from one of strict statutory analysis to a balancing of the equities. The deference granted to the federal agency is dramatically reduced and the role of the reviewing court is expanded when the federal agency changes its eligibility standards after the fact. By reversing the District Court on statutory grounds and preventing the District Court from balancing the equities, the Second Circuit violated the *Securities Comm'n* requirements and deprived Vermont of important procedural rights guaranteed by the APA and this Court.

The principles of the *Securities Comm'n* case have also been followed in at least three federal appeals courts other than the Second Circuit, creating conflicts among the Circuit Courts with regard to the right to an equitable analysis when federal agencies change standards retroactively. *State of Ill. By Ill. Dept. of Public Aid v. Bowen*, 786 F.2d 288, 292 (7th Cir. 1986) (*Securities Comm'n* analysis used to evaluate validity of HHS attempt to retroactively apply a revised interpretation of requirement for receipt of federal matching funds); *Bedford County Memorial Hospital v. Health and Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985) (HHS attempt to retroactively apply revised regulation reversed on basis of *Securities Comm'n* balancing test); *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250, 1258-1263 (3d Cir. 1978) (*Securities Comm'n* analysis used to reverse HHS retroactive action against health care provider); *St. John's Hickey Memorial Hospital v. Califano*, 599 F.2d 803, 812-815 (7th Cir. 1979) (HHS retroactive action against hospital reversed for inexcusable failure to provide prior notice of change in agency interpretation).

The Second Circuit's refusal to address Vermont's discrimination claims also violates case precedents of this Court and the courts of appeals which mandate consistent applications of agency interpretations and prohibit dis-

parate treatment of similarly situated parties. *Morton v. Ruiz, supra,* at 231; *Contractors Transport Corp. v. United States,* 537 F.2d 1160, 1162 (4th Cir. 1976); *Mary Carter Paint Co. v. FTC,* 333 F.2d 654 (5th Cir. 1964) (Brown, J., concurring), rev'd on other grounds, 382 U.S. 46 86 S. Ct. 219, 15 L. Ed. 2d 123 (1965).

Finally, the Second Circuit's refusal to reach Vermont's estoppel claim violates this Court's recent holding in *Heckler v. Community Health Services of Crawford,* 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984). The *Community Health Services* case held that estoppel is available as a defense against federal agency action when appropriate facts and circumstances exist. Since *Heckler v. Community Health Services,* this Court has remanded one case to the district court level for consideration of estoppel claims, *United States v. Locke,* 467 U.S. 1225, 105 S. Ct., 1785, 1790, 1801-1802, 85 L. Ed. 2d 64 (1985). In addition, this Court has granted two petitions for certiorari by remanding to the appeals court level for consideration of estoppel claims, *Walters v. Home Savings & Loan Association of Lawton, Oklahoma,* 467 U.S. 1223, 104 S. Ct. 2673, 81 L. Ed. 2d, 870 (1984); *Block v. Payne,* 469 U.S. 807, 105 S. Ct. 65, 83 L. Ed. 2d, 15 (1984). In *United States v. Locke,* this Court ordered remand for consideration of estoppel claims where a private mining applicant missed the statutory deadline for filing a mining claim due to reliance upon alleged misinformation provided to the company by a federal government official. Remand was for the express purpose of determining whether estoppel entitled the company to the mining claim despite the statutory violation. Vermont's estoppel claim is conceptually identical to the *Locke* claim except that Vermont does not concede to a statutory violation.

B. Erroneous Statutory Interpretation

The Second Circuit panel reversed the District Court interpretation of the applicable statutes and upheld

HHS's retroactive determination that Vermont statutes did not mandate periodic hearings for children for whom parental rights have been terminated (TPR children). TPR children constitute less than one percent of Vermont's foster care population (about 25-50 children).

The Second Circuit held that, during fiscal year 1981, Title 33, Vermont Statutes Annotated § 658 and various other Vermont statutes failed to meet the 42 U.S.C. § 675(5)(C) requirements that "*each*" child in foster care receive "*periodic*" review hearings by either a court or an administrative body "*appointed* or *approved*" by a court. *See*, Second Circuit Decision, App., p. 11a.

The District Court (Billings, J., a former Vermont Supreme Court Chief Justice and Vermont Trial Court Judge) found that 33 V.S.A. 658(a) mandated biennial review hearings for all children in foster care including TPR children in fiscal year 1981 and thereby met the requirements of 42 U.S.C. 675(5)(C). *See*, District Court Decision, App., pp. 30a-31a. Besides the above described § 658 hearings, 33 V.S.A. 659 and 15 V.S.A. § 440-442 provide TPR children with the opportunity to receive additional court hearings, and department procedures require semi-annual administrative review hearings. *See*, App., pp. 56a-60a for the text of these statutes. In addition, the District Court listed other hearing opportunities provided to children in custody, but those hearings take place prior to the TPR stage and thus are irrelevant to the disagreement between the District Court and the Court of Appeals. *See*, District Court Decision, App., pp. 30a-31a.

At the least, the disagreement between the District Court and the Second Circuit demonstrates that the operative terms of 42 U.S.C. 675(5)(C) are ambiguous. *FAA Administrator v. Robinson*, 422 U.S. 255, 263, 95 S. Ct. 2140, 2146, 45 L. Ed. 2d 164 (1975). Furthermore, the fact that Vermont is alleging that HHS itself used multiple interpretations of § 675(5)(C) in review-

ing the various state eligibility applications for fiscal year 1981 provides further indications of statutory ambiguity.

By enforcing statutory conditions that are, by all indications, ambiguous, the Second Circuit is violating the rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ea. 2d. 1981). *Pennhurst* declared that statutes defining conditional federal grant programs operate much in the nature of a contract and, therefore, the conditions set forth in such statutes can be enforced only if they are unambiguous.

Despite ample opportunity, HHS failed to promulgate regulations or otherwise notify Vermont of the agency's particularized interpretation of the § 675(5)(C) requirements prior to either the first fiscal year 1981 eligibility review (which Vermont passed) or the surprise retroactive review (which Vermont failed as a result of relying on HHS's prior assurances of compliance).

By upholding the HHS ineligibility determination, the Second Circuit has enforced ambiguous statutory terms, and ignored the fairness considerations which the factual record developed by the District Court plainly raised.

Therefore, Vermont requests a grant of certiorari for the purpose of ensuring application of the rules of law and principles of fairness long recognized by this Court to this case, and for the further purpose of eliminating the conflict between the Second Circuit decision and the recent decisions of the other appeals courts.

Since this case reached the federal courts on judicial review, the entire record consists of the paper record certified by HHS's Grants Appeals Board to the District Court. Therefore, the District Court, Second Circuit, and this Court are each equally capable of reviewing the evidence necessary to a decision on all of the issues herein raised.

Since Vermont has been trying to reaffirm its right to the federal funds in issue for nearly five years, Vermont desires the most expeditious resolution of these issues possible. Therefore, Vermont requests this Court to take jurisdiction of the merits of this case. In the alternative, Vermont would request remand to the District Court for consideration of Vermont's equitable arguments.

CONCLUSION

For the forgoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of September one thousand nine hundred and eighty-six.

No. 85-6320

STATE OF VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and OTIS BOWEN, M.D., SECRETARY*, in his official capacity, his agents and assigns,
Defendants-Appellants.

[Filed Sept. 25, 1986]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, State of Vermont Department of Social And Rehabilitation Services,

Upon consideration by the panel that heard the appeal, it is

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* Pursuant to Fed. R. App. P. 43(c)(1), Otis Bowen, M.D. has been substituted as a defendant-appellant.

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a voice be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 970—August Term, 1985

(Argued March 20, 1986 Decided August 12, 1986)

Docket No. 85-6320

STATE OF VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,
Plaintiff-Appellee,

—against—

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and OTIS BOWEN, M.D. SECRETARY*, in his official capacity, his agents and assigns,
Defendants-Appellants.

Before:

KAUFMAN, TIMBERS and MINER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Vermont (*Billings, J.*) reversing a decision of the United States Department of Health and Human Services Grant Appeals Board holding the

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* Pursuant to Fed. R. App. P. 43(c)(1), Otis Bowen, M.D. has been substituted as a defendant-appellant.

state of Vermont ineligible for previously distributed federal foster care funds.

Reversed.

STEVEN B. MCLEOD, Special Assistant Attorney General, Barre, VT (Michael O. Duane, Assistant Attorney General, Vermont Department of Social and Rehabilitation Services, of counsel) *for Plaintiff-Appellee.*

CHRISTOPHER B. BARIL, Assistant U.S. Attorney, Rutland, VT (Joyce Elise McCourt, Assistant Regional Attorney, Department of HHS, Boston, MA, George W.F. Cook, United States Attorney, District of Vermont, Richard K. Willard, Assistant U.S. Attorney General, of counsel) for *Defendants-Appellants.*

CAROL R. GOLUBOCK, Washington, D.C. (Marion Wright Edelman, Children's Defense Fund, Washington, D.C., Nancy Flickinger, Patrick O'Keefe, Robert P. Parker, Peter K. Rofes, Daniel M. Singer, Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., of counsel) for *Amicus Curiae* Children's Defense Fund.

MINER, *Circuit Judge*:

The Secretary of the United States Department of Health and Human Services ("Secretary") appeals from a judgment of the United States District Court for the District of Vermont (Billings, J.) reversing a decision of the Department of Health and Human Services Grant Appeals Board ("GAB") which held the state of Vermont ineligible for certain previously distributed federal foster care funds. For the reasons set forth below, we reverse.

I. BACKGROUND

A. *The Federal Statutory Scheme*

The instant appeal arises out of conflicting state and federal approaches to the problem of foster care. In re-

sponse to demonstrated inadequacies in our nation's system of foster care, *see generally* 125 Cong. Rec. S29938 (daily ed. Oct. 29, 1979) (remarks of Sen. Cranston), Congress enacted Pub. L. No. 96-272, the Adoption Assistance and Child Welfare Act (the "Act"), signed into law by President Carter on June 17, 1980. The Act amended Title IV of the Social Security Act and sought to provide the states with fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system. In particular, the Act amended the Title IV-B program, 42 U.S.C. §§ 620-628, which provides funds to the states for the improvement of child welfare services, and created the Title IV-E program, 42 U.S.C. §§ 670-676, which provides reimbursement to the states for foster care maintenance and adoption assistance payments made by the states on behalf of eligible children.

In amending Title IV-B, Congress authorized annual appropriations of $266 million "for the purpose of . . . establishing, extending, and strengthening child welfare services. . . ." 42 U.S.C. § 620(a). Of this $266 million, each state would receive a proportionate share of the initial $141 million appropriation. For a state to receive its share of any funds appropriated in excess of $141 million, the Act provides that the state must certify, *inter alia*, that it:

> (2) has implemented and is operating to the satisfaction of the Secretary—
>
> * * *
>
> (B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State. . . .

42 U.S.C. § 627(a). Section 675(5) of the Act defines "case review system" as procedure for assuring that

> (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as de-

fined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or place for adoption or legal guardianship, and

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

42 U.S.C. § 675(5).

As is evident from the statute, and more particularly, its legislative history, *see, e.g.*, 125 Cong. Rec. S22685 (daily ed. Aug. 3, 1979) (remarks of Sen. Cranston), Congress afforded the states considerable flexibility to develop administrative procedures compatible with their own unique foster care circumstances. Despite this gen-

eral flexibility, however, Congress insisted that any state requesting excess funds satisfy certain minimum requirements. First, within six months after a child's placement in foster care, and at least once every six months thereafter for the duration of his or her stay, the Act mandates that a status review be conducted, either by a state court or by an impartial state administrative body. 42 U.S.C. § 675(5)(B). Second, with respect to children still in foster care after eighteen months, the Act requires that a court or court appointed body hold periodic dispositional hearings to determine the child's future status. *Id.* § 675(5)(C).

B. *Vermont's Statutory Scheme*

Prior to the Act's passage, Vermont statutory foster care procedures provided that, at the request of certain persons or agencies, the state's attorney "shall prepare and file a petition [with the juvenile court] alleging that a child is in need of care or supervision." Vt. Stat. Ann. tit. 33, § 645 (1981). Thereafter, the juvenile court was required to hold a hearing and issue an order containing its findings with respect to the allegations in the petition. If the court found that the child was in need of care or supervision, the court was required to continue the hearing for the purpose of "considering the disposition to be made in the proceedings." *Id.* § 654(b). The court was empowered to place the child in foster care and terminate the parental rights of the child's parents and transfer those rights to an individual, agency, or institution. *Id.* § 656(a).

When a court ordered placement in foster care, Vermont law required that the court's dispositional order be reviewed "two years from the date [it was] entered and each two years thereafter." *Id.* § 658(a). That review would include a juvenile court hearing only if a party to the initial dispositional hearing so requested, or if the court in its own discretion so ordered. In those cases

where the juvenile court's dispositional order terminated parental rights, Vermont law did not require that the disposition of the child's situation be reviewed.

After passage of the federal Act, the Vermont legislature amended the state's foster care procedures in order to render the state eligible to receive the additional Title IV-B federal funds. The most significant changes included shortening the time for review of the juvenile court's dispositional order placing a child in foster care from two years to eighteen months, and requiring that review of the dispositional order include a hearing by the juvenile court or by an administrative body appointed or approved by the court. Vt. Stat. Ann. tit. 33, § 658 (1985 Supp.). The amended procedures did not, however, require any dispositional review for children whose parents had had their parental rights terminated ("TPR" children), even if such a child remained in foster care after termination. Vermont conceded in the district court that a dispositional hearing for a TPR child who remains in foster care is undertaken (after the initial hearing) only if the juvenile court, in its discretion, orders or conducts such a hearing, or if adoption proceedings are initiated in the probate court with respect to that child.

C. *Proceedings Below*

In fiscal year 1981, the first year for which the Act was applicable, states were instructed to declare their eligibility for the additional Title IV-B funds by a statement of self-certification. Vermont submitted its self-certification on July 29, 1981, attesting to the fact that it was in compliance with the Act's procedures. That self-certification was accepted by the Secretary's agent, the Acting Commissioner of the Administration for Children, Youth and Families ("ACYF"). Accordingly, for fiscal year 1981, Vermont received $346,872 in additional Title IV-B funds.

In April of 1982, all states, including Vermont, were informed that their self-certifications would be subject to a vertification review by ACYF to assure compliance with the Act. During the course of its review, ACYF discovered that Vermont did not have procedures to assure periodic dispositional hearings for TPR children and in fact had not been providing such hearings. On August 12, 1983, ACYF's Acting Commissioner notified Vermont that it had failed to satisfy the requirements of the Act for fiscal year 1981 in three respects. The Commissioner's notice stated:

> [S]ince Vermont did not provide dispositional hearings for TPR children in Fiscal Year 1981, the State failed to meet the requirements of section 427 [42 U.S.C. § 627].
>
> In addition to the failure to provide dispositional hearings for TPR children, Vermont failed to meet the requirements of section 427 on two other grounds. . . . In Fiscal Year 1981, Vermont law stated that "every order transferring legal custody or guardianship over the person shall be reviewed *two years from the date entered*. . . ." (Emphasis added.) Vt. Stat. Ann tit. 33, § 658(a) (1971). Thus, contrary to the requirements of section 475(5)(C), State law did not require dispositional hearings within 18 months of each child's original placement.
>
> In Fiscal Year 1981, State law provided that any person to whom legal custody or guardianship has been transferred must file a notice of biennial review with the court before whom [sic] the proceeding was held, the State's attorney and all parties to the proceeding. Vermont law also stated that "(w)ithin 20 days of such notice, any such party may file a request for a hearing with the court, or the court on its own motion may order a hearing . . . . *In the event that no such hearing is requested or ordered, an order shall be deemed reviewed* . . . ." (Emphasis added.)

Vt. Stat. Ann. tit. 33, § 658(c) (1981). The State law thus did not make dispositional hearings mandatory. Consequently, Vermont law did not meet the requirements of section 475(5)(C) and the State failed to comply with section 427.

On August 23, 1983, Vermont filed an appeal with GAB, which upheld the Commissioner's determination. GAB, however, addressed only Vermont's failure to provide periodic dispositional hearings to TPR children; it specifically declined to reach the two additional issues discussed in the ACYF Commissioner's decision. In October of 1984, Vermont petitioned for review of GAB's decision in the district court. Following cross-motions for summary judgment, Judge Billings granted Vermont's motion and denied that of the Secretary, reasoning that Vermont law, as interpreted by the state itself, did provide TPR children with appropriate dispositional hearings. In reversing GAB's decision, Judge Billings did not confine himself to the sole issue ruled upon by GAB; instead, he discussed and rejected the other two grounds for ineligibility cited by the ACYF Commissioner but not passed upon by GAB. From that decision, the Secretary now appeals. We reverse.

II. DISCUSSION

The threshold question for our determination concerns the applicable standard of review. Before the district court, the parties agreed that GAB's decision could only be set aside if it was determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In light of intervening Supreme Court decisions, *Bennett v. New Jersey*, 105 S. Ct. 1555 (1985); *Bennett v. Kentucky Department of Education*, 105 S. Ct. 1544 (1985), Judge Billings suggested that the standard applicable to a review of compliance with a restrictive grant program was the less deferential substantial evidence test. The issue

was not firmly decided, however, since Judge Billings concluded that GAB's decision could not withstand either standard. Assuming, without deciding, that the substantial evidence standard governs GAB's decision, we nonetheless conclude that the decision was properly supported and therefore must be reinstated.

In rejecting GAB's determination that Vermont "failed to provide procedures for assuring periodic dispositional hearings for TPR children," Judge Billings found that "the Secretary relied not upon her agency's interpretation of an applicable federal statute, but upon her agency's interpretation of Vermont statutes and procedures." *State of Vermont Department of Social and Rehabilitation Services v. United States Department of Health and Human Services*, No. 84-325 slip op. at 13 (D. Vt. Aug. 28, 1985). According to Judge Billings, these state procedures "satisfied the guidelines of Section 675." *Id.* at 14. Moreover, Judge Billings was unable to "discern any way that the decision of the Secretary comported with the dictates of the federal statute[,]" *id.*, and concluded that the decision was without justification. We disagree. In our view, the district court's reliance on Vermont's statutory scheme was erroneous; section 658(b) of the Vermont statute simply does not apply to TPR children, and therefore falls short of the federal mandate that *every* child in foster care receive a periodic dispositional hearing.

On appeal, Vermont maintains that its 1981 statutory foster care procedures comply with the federal Act's dispositional hearing requirement in three ways. As discussed below, we find all of its arguments unpersuasive.

First, Vermont contends that its statute, Vt. Stat. Ann. tit. 33, § 658, satisfies the federal requirement that dispositional hearings be held periodically for all foster care children. That section provides:

> (a) Unless otherwise specified therein an order under the authority of this chapter transferring legal

custody, or guardianship over the person or residual parental rights and responsibilities of a child to an individual, agency, or institution shall be for an indeterminate period and provided further that, every order transferring legal custody or guardianship over the person shall be reviewed two years from the date entered and each two years thereafter. In no event shall any such order remain in force or effect beyond a person's twenty-first birthday.

(b) Any person to whom legal custody or guardianship over the person has been transferred shall thereafter file a notice of biennial review with the court before whom [sic] such proceeding was held, the state's attorney having jurisdiction, and all parties to the proceeding, and, in addition, shall file with such court and such state's attorney a report and recommendation. . . .

(c) Within 20 days of such notice, any such party may file a request for a hearing with the court, or the court on its own motion may order a hearing. Within 30 days after any such request or order, a hearing shall be held for the purpose of considering the review of the order of disposition, which hearing shall be held in all respects as a hearing on a petition under this chapter, except that in such a hearing, all evidence helpful in determining the questions presented, including oral and written reports, may be admitted and relied upon to the extent of its probative value, even though not competent in a hearing on a petition. In the event that no such hearing is requested or ordered, an order shall be deemed reviewed within the meaning of subsection (a), and shall remain in force for a period of two years after the expiration of the time within which a hearing could have been requested, without the entry of an additional order.

Id. § 658(a)-(c) (1981). The central failing in this statutory provision is found in Vermont's concession in the district court that section 658 hearings are merely discretionary in the case of TPR children. The language of section 675(5)(C) of the federal Act, however, is clear in extending to "*each* child in foster care under the supervision of the State" the protection of periodic dispositional hearings. 42 U.S.C. § 675(5)(C) (emphasis added). Moreover, the legislative history amply demonstrates that section 675(5)(C) requires dispositional hearings for *all* foster care children. The central purpose of the legislation was to remove children from long-term foster care, either by reuniting them with their parents or by placing them with adoptive parents or in some other permanent arrangement. In introducing the Senate version of the bill in 1979, Senator Cranston made clear the need for dispositional hearings to be held at specific intervals after a child's placement:

> [T]he provision for a dispositional hearing after a set period of time is, I believe, of critical importance. One of the prime weaknesses of our existing foster-care system is that, once a child enters the system and remains it it for even a few months, the child is likely to become "lost" in the system. Yearly judicial reviews of the child's placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child's future placement should be. Foster care, with few exceptions, should be a temporary placement; unfortunately, under our existing system, temporary foster care becomes a permanent solution for far too many children. This provision requiring a dispositional hearing after a child has been in foster care for a specific period of time should assist States in making the difficult, but critical, decisions regarding a foster child's long-term placement.

125 Cong. Rec. S22684 (daily ed. Aug. 3, 1979); *see also* H. Rep. No. 136, 96th Cong. 1st sess. 50 (1979) (remarks of Rep. Ullman).

Contrary to Vermont's assertion, nothing in the Act excludes TPR children in foster care from the requirement of periodic dispositional hearings. Indeed, this was the specific conclusion of an American Bar Association study:

> Children who are still in foster care following termination of parental rights proceedings or following voluntary surrender of parental rights are also covered by the dispositional hearing requirement [of the Act]. Until they are actually placed for adoption or guardianship, they are still in state supervised foster care and, thus are entitled to a dispositional hearing under the explicit language of the act. Further, as a practical matter court involvement may be necessary to insure [sic] that a plan is being implemented—for example, that adoptive parents are being sought.

American Bar Association, *Comparative Study of State Case Review System Phase II: Dispositional Hearings* (1984), volume 3, at 2-45.

Judge Billings acknowledged that no dispositional hearing is held after the termination of parental rights, but considered that fact of no moment, noting that "[i]t comports with neither the federal statute nor common sense to require an additional initial dispositional hearing." Slip op. at 16. Apparently, Judge Billings based this conclusion on his view that a termination of parental rights was in fact a "disposition" after which no further hearings would be necessary. That finding, however, misperceives the very purpose of the Act, *viz.*, to assure all children periodic hearings until a *final* disposition is effected. Since the mere termination of parental rights does not serve to remove a child from the foster care

system, Judge Billings erred in concluding that TPR children required no further dispositional hearings.

Neither are we persuaded by Vermont's contention that its state adoption procedures, which impose a requirement of a probate court hearing prior to adoption approvals, constitute dispositional hearings that satisfy the requirements of section 675(5)(C). Significantly, probate court intervention does not occur unless and until adoption proceedings have been commenced. Clearly, TPR children who are not fortunate enough to be considered for adoption never will receive such a hearing. And, as Vermont concedes, if an adoption plan fails to materialize or progress, no judicial hearing will be held.

In addition, it is clear to us that, contrary to Vermont's assertion, the six-month case reviews required by section 675(5)(B) of the Act do not, of their own accord, satisfy the more stringent dispositional hearing requirement of section 675(5)(C). Even the most cursory comparison reveals that the requirements of section 675(5)(C) are far more demanding than those of the six-month case reviews contemplated by section 675(5)(B). For example, there is no requirement that the section 675(5)(B) review be held before a court or court-approved body. Moreover, the six-month review is designated merely to "project a likely date" by which a permanent arrangement will be made, while the section 675(5)(C) hearing is held for the express purpose of determining the future status of the child. Finally, and perhaps most important, section 675(5)(C) mandates the application of "procedural safeguards," in order to protect a child's interest. No similar requirement is to be found in section 675(5)(B). There simply can be no question that the section 675(5)(C) hearing imposes an additional level of review, beyond that provided in section 675(5)(B), aimed at pressing a foster child's case to a permanent resolution.

We likewise reject Vermont's contention that a decision by the juvenile court to refrain from holding discretion-

ary 659 hearings for a TPR child pursuant to Vt. Stat. Ann. tit. 33, § 659 (1981)[1] can reasonably be construed to amount to tacit approval of the results of the administrative reviews. GAB properly rejected this argument, finding that such a theory of post-hoc approval did not fulfill the statutory requirement for a dispositional hearing " 'in a family or juvenile court or another court . . . of competent jurisdiction, or by an administrative body appointed or approved by the court . . .' since the State presented no evidence of any appointment or approval by the juvenile court authorizing the State to conduct dispositional hearings." GAB decision at 6 (quoting 42 U.S.C. § 675(5)(c)). Moreover, as GAB reasoned,

> [T]here is no indication in the record that the juvenile court judge was required to make, or even as a matter of practice made, any formal determination not to continue review hearing for a TPR child. Such a determination, depending upon its content, might arguably be regarded as an appointment of the State to hold dispositional hearings. (However, judicial approval simply of the results of the State's six-month administrative reviews would not be sufficient since section 475(5)(C) [42 U.S.C. § 675(5)(C)] requires approval of an "administrative body" to conduct dispositional hearings.) We see no

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[1] That section provides, in pertinent part:

> (a) An order of the court may be set aside by a subsequent order of this court or, upon appeal from a denial thereof by that court, by a court upon appeal therefrom, when it appears that the initial order was obtained by fraud or mistake sufficient therefor in a civil action, or that the court lacked jurisdiction over a necessary party or of the subject matter, or that newly discovered evidence so requires. An order of the court may also be amended, modified, set aside or terminated by that court at any time upon petition therefor by a party or on its own motion on the ground that changed circumstances so require in the best interests of the child.

Vt. Stat. Ann. tit. 33 § 659(a) (1981).

> basis for implying merely from the absence of further review by the juvenile court judicial approval of the State to conduct dispositional hearings.

Id.

In short, Vermont has failed to comply with the stringent requirements of section 675(5)(C). GAB therefore was correct in its decision finding Vermont ineligible for the 1981 Title IV-B funds and the district court erred in reversing that determination.

III. CONCLUSION

The judgment appealed from is reversed and the matter is remanded to the district court with instructions to enter an order affirming GAB's decision.[2]

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[2] In light of this disposition, it is unnecessary for us to address the additional argument advanced by the Secretary that the district court improperly decided issues which were not passed upon by GAB. Nor need we reach the contention of *amicus curiae* that the district court erred in finding that the Act did not require "face-to-face" hearings.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT VERMONT

Civil 84-325

FRANKLIN S. BILLINGS, JR.
STATE OF VERMONT DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and MARGARET M. HECKLER, SECRETARY, in official capacity, her agents and assigns

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JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Motion of Plaintiff for Summary Judgment is *granted.* Motion of Defendant for Summary Judgment is *denied.* The decision of GAB concerning the ineligibility of Vermont for Section 627 funds is *reversed.* The reasons for non-compliance relied upon by Acting Commissioner of

ACYF Biggs in her August 12, 1983 Decision are also *reversed.*

Date 10-29-85

LEONARD W. LAFAYETTE
Clerk

/s/ Ramona E. Roberts
RAMONA E. ROBERTS
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 84-325

STATE OF VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES and MARGARET M. HECKLER, SECRETARY, in her official capacity, her agents and assigns

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[Filed Aug. 28, 1985]

ORDER

This action was brought by the State of Vermont Department of Social and Rehabilitation Services (SRS) to seek judicial review of a final decision of the Secretary of the United States Department of Health and Human Services (HHS). The decision under review concerned a determination of the Secretary that the State of Vermont was ineligible to receive certain funds awarded for the fiscal year 1981 pursuant to the Adoption Assistance and Child Welfare Act of 1980 (AACW).

This proceeding is currently before the Court on the motion of plaintiff SRS for summary judgment and the motion of defendant HHS to dismiss, or in the alternative, for summary judgment. For the reasons recited

below, the motion of plaintiff is GRANTED and the motion of the defendant is DENIED.

I. STATUTORY FRAMEWORK

On June 17, 1980, President James Earl Carter signed into law the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 42 U.S.C. §§ 620 *et seq.* The stated Congressional purpose for enacting this legislation was to appropriate money to "enabl(e) each State to provide, in appropriate cases, foster care and adoption assistance for children . . . eligible for assistance under the State's plan approved" pursuant to restrictive federal statutory guidelines. 42 U.S.C. § 670; *see also* 1980 U.S. Code Cong. & Adm. News, p. 1448. By implementing the restrictive guidelines, Congress sought to encourage each State to consider reuniting foster care children with their families or to provide a permanent home for the child. Either action would reduce the risk of a foster care child being "lost" in a State foster care system.

To implement this program, Congress amended Title IV-B of the Social Security Act (SSA), regarding appropriations for child welfare services, and also created a new Title IV-E of the SSA regarding federal payments for foster care and adoption assistance. In Title IV-B, Congress authorized annual appropriations of up to $260,000,000.00 to establish, extend and strengthen child welfare services. 42 U.S.C. § 620. Of this $260,000,000.00, each State would receive a pro rata share of the first $141,000,000.00 appropriated. If Congress appropriated more than this sum, States could receive an excess appropriated more than this sum, States could receive an excess appropriation only after implementing certain federally mandated procedures regarding foster care of children. 42 U.S.C. § 621 (formula for pro rata allotment to states); 42 U.S.C. § 627 (foster care child protection required for receipt of excess share of funds).

Section 627(a) states that a State may only receive excess funds if the State:

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardian; and

(2) has implemented and is operating to the satisfaction of the Secretary—

(A) a statewide information system from which the status, demographic characteristics, location and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

The definition referred to, in Section 675(5) of the SSA, states that:

(5) The term "case review system" means a procedure for assuring that—

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six

months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship, and

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and any determination affecting visitation privileges of parents.

The definition referred to above, in Section 675(6) of the SSA, states that:

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate per-

sons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

In summary, Congress adopted the AACW to effect reforms in the way that the States administered their foster care systems. The states that complied with the restrictive guidelines could then receive an economic reward by being eligible to receive excess federal grant funds.

II. FACTS

After enactment of the AACW in June of 1980, the Carter administration Department of Health and Human Services issued proposed regulations governing state compliance with Section 627. They issued the regulations on December 31, 1980. 45 F.R. 86817 (1980). After the Reagan administration took office, HHS revoked the proposed regulations. 46 F.R. 14895 (1981). HHS did not adopt replacement regulations until May 23, 1983. 48 F.R. 23118 (1983).

In the absence of any regulatory direction concerning requirements for state plan submissions, on July 1, 1981, HHS, through its Administration for Children, Youth and Families (ACYF), informed the States that they could obtain excess 1981 fiscal year § 627 funds by submitting, on or before July 31, 1981, a certificate of self-compliance with § 627. Record, pp. 60-68. On July 29, 1981, the State of Vermont certified that it was in compliance with the federal statute.

On August 3, 1981, ACYF Region I informed Vermont that Region I needed additional information concerning Vermont's interim implementation of a statewide information system, implementation of case review and dispositional hearing systems, identification of the personnel who would carry out administrative reviews, and specification

of operative procedural safeguards with respect to retention of parental rights. After the State furnished Region I with additional information, in September, 1981, Region I approved the request by Vermont for additional fiscal year 1981 funds. Vermont then received and utilized $346,872.00. Pltf. Memo., p. 5.

In April, 1982, HHS informed Vermont that ACYF Region I would conduct a supplemental review of Vermont eligibility for these funds. Record, pp. 78-79; Pltf. Memo., p. 5. This supplemental review involved two components: an analysis of state level policies and procedures respecting foster care children and an evaluation of a sample of foster care case records. Record, p. 78.

On July 12, 1982, Region I sent to the State of Vermont a letter requesting clarification of the state procedure with regard to "dispositional hearings" for children in state custody after there had occurred a termination of parental rights. This was the first time that a federal agency had raised this issue. In addition, Region I also requested information concerning the state policy regarding "periodic" hearings after the placement of a child. Record, p. 131.

The State of Vermont responded to this inquiry by pointing out that the termination of parental rights was itself a dispositional hearing within the meaning of the statute. Vermont also indicated that the periodic hearings mandated by Vermont statute met the requirements of Section 627. Record, pp. 132-34. On September 22, 1982, an ACYF official wrote to SRS that HHS would not accept Vermont's self-certification of eligibility for excess 1981 funds. The reason given for rejection was "(s)pecifically: the State does not require dispositional hearings for children whose parental rights have been terminated, even though those children remain in foster care." Record, p. 135.

III. PROCEDURAL HISTORY

After Region I notified the State of Vermont of the recommendation for disapproval, the Region then had to send a decision package to the Commissioner of ACYF. ACYF Staff Instruction for Section 427 Validation Review, p. 12; Record, p. 124. Although the Record does not indicate whether Region I did forward such a transmittal, the Commissioner did make a final decision regarding the recommendation. On August 12, 1983, Acting Commissioner of ACYF Lucy Biggs held Vermont in non-compliance with Section 627. Biggs also added two additional grounds for holding Vermont ineligible for the fiscal year 1981 funds. Record, pp. 147-50.

By letter dated August 25, 1983, the State of Vermont sent a notice of appeal to the Grant Appeals Board (GAB), an internal review board of HHS. The Board acknowledged receipt of the appeal on September 22, 1983. After staying the proceedings for several months to afford the parties an opportunity to resolve their differences, the GAB then received briefs from each side. On June 27, 1984, the GAB issued a decision that sustained the determination that Vermont was ineligible to receive fiscal year 1981 Section 627 excess funds. This determination of the GAB became a final decision of the Secretary of HHS.

IV. JURISDICTION

The State of Vermont initially sought judicial review of this decision in the United States Court of Appeals for the Second Circuit. Vermont relied upon regulations adopted by HHS which provided that for "all programs funded under the provisions of these regulations and titles IV-E and IV-B of the Social Security Act," the procedures and requirements embodied in 45 C.F.R. § 201.7 should apply to any issue regarding judicial review. 45 C.F.R. § 1355.30. The applicable regulation, 45 C.F.R. § 201.7, states that "(a)ny state dissatisfied

with a final determination of the Secretary" regarding withholding of a payment for failure to comply with a relevant statutory provision shall file a petition for review of the determination with the United States Court of Appeals for the circuit including the aggrieved state.

However, direct review of administrative agency action may only take place in the United States Courts of Appeals when explicitly authorized by statute. *Florida Power and Light Company v. Lorion*, 53 U.S.L.W. 4360, 4365 (March 20, 1985) (Congressional intent governs initial subject matter jurisdiction in United States Courts of Appeals). The statute governing Courts of Appeals review of public assistance determinations states that such review is only available after a determination under sections 304, 804, 1204, 1354, 1384 or 1396c of the SSA. The statute makes no reference to review of determinations under Titles IV-B or IV-E of the SSA. 42 U.S.C. §§ 1316(a)(1), 1316(a)(3). Apparently on this basis, the United States Court of Appeals for the Second Circuit dismissed the action without prejudice.

In the absence of any statute creating jurisdiction in a different federal court, review of administrative agency action takes place pursuant to the Administration Procedures Act (APA), 5 U.S.C. §§ 701-706. Subject matter jurisdiction for APA review lies in the federal district courts. 28 U.S.C. § 1331; *Standard Oil Co. v. FTC*, 596 F.2d 1381, 1384 (9th Cir. 1979). In this case, no statute precludes judicial review of the agency action, 5 U.S.C. § 701(a)(1); no law commits this agency action to sole agency discretion, *id.* § 701(a)(2); and there has been a final agency action for which there exists no adequate remedy other than review under the APA, *id.* § 704. *CETA Workers' Org. Committee v. City of New York*, 617 F.2d 926, 935 (2d Cir. 1980). Accordingly, this Court has subject matter jurisdiction to review the final decision of the Secretary of HHS.

V. DISCUSSION

As a threshold matter, this Court must determine the proper standard of review to apply in this proceeding. At oral argument, the parties apparently agreed that the Court could only set aside the agency action after a finding that the decision of the Secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Three recent United States Supreme Court decisions have each indicated that the standard applicable to a review of compliance with a restrictive grant program is that of substantial evidence. *Bell v. New Jersey*, 461 U.S. 773 (1983); *Bennett v. New Jersey*, 53 U.S.L.W. 4337 (March 19, 1985); *Bennett v. Kentucky Department of Education*, 53 U.S.L.W. 4332 (March 19, 1985). Each of these cases involved judicial review of the alleged failure of a State to comply with restrictive conditions associated with an award of federal grant money made pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (as amended) (West 1985). In each of the cases, the Supreme Court emphasized the contractual nature of the relationship between the States and the federal government, and in each case the Court concluded that the role of a Court, in "reviewing a determination by the Secretary that funds have been misused is to judge whether the findings are supported by substantial evidence and reflect application of the proper legal standards." *Bennett v. New Jersey*, *supra*, 53 U.S.L.W. at 4341. Although these cases indicate that this Court might apply a less deferential standard of review to the case at bar, such a finding is unnecessary here as the Court finds that the action taken by the Secretary can not survive review under even the arbitrary and capricious standard.

The final decision of the Secretary of HHS declared the State of Vermont ineligible for 1981 excess Section 627 funds because Vermont "failed to provide procedures

for assuring periodic dispositional hearings for TPR children." GAB decision, p. 7. To reach this decision, the Secretary relied not upon her agency's interpretation of an applicable federal statute, but upon her agency's interpretation of Vermont statutes and procedures. HHS possessed no expertise with regard to Vermont law, and simply substituted its analysis of Vermont law for the interpretation advanced by the Vermont agency charged with the responsibility of administering the Vermont statute. While the mere existence of contrary conclusions does not mandate a reversal of the findings of the Secretary, contrary determinations of state law by a state agency strip away the veneer of agency expertise that normally adheres to federal agency action.

The federal statute required that a State conduct "periodic hearings" throughout the term of a foster care placement. HHS decided that a state must hold such hearings every 18 months, although it does not appear from the Record exactly how HHS determined that "periodic" meant "every 18 months." In response to the HHS interpretation of the statute, SRS issued a departmental memorandum instructing all SRS districts to conduct the previously biennial hearings every 18 months. Record, p. 28. SRS also notified the administrative judge for Vermont trial courts that SRS would seek accelerated scheduling of dispositional hearings in order to comply with the federal statute. Record, pp. 29-30. The applicable Vermont statute does not prohibit holding dispositional review hearings at intervals of less than 2 years. 33 V.S.A. § 658(b). The procedure implemented by the State of Vermont satisfied the guidelines of Section 675.

Furthermore, this Court cannot discern any way that the decision of the Secretary comported with the dictates of the federal statute. The goal of Congress was to bring about changes in the way that States administered their foster care systems. One objective was that all States would implement procedures to guarantee dispositional

review of all foster care children every eighteen months. When notified of this requirement, Vermont adopted administrative procedures to bring about this result. In 1982, the Vermont legislature incorporated these procedures by statutory amendment. 33 V.S.A. § 65[illegible] (amended 1982). Vermont responded to the passage of the AACW promptly and appropriately. Without even addressing issues of estoppel and equity, there is no justification, under the federal governing statute, for the decision of the Secretary.

When the GAB held that Vermont had failed to assure periodic dispositional hearings for children whose parental rights had been terminated, the GAB declined to address the other Agency findings concerning ineligibility. These two findings were that Vermont did not hold dispositional hearings for all foster care children within 18 months of their placement in foster care and that dispositional hearings only occurred when requested by a party. Each of these findings is arbitrary, capricious and wrong as a matter of law.

As outlined in the appellate brief of the State of Vermont presented to the GAB, Record, pp. 38-41, Vermont law guarantees that a dispositional hearing will be held within 18 months of the placement of a child in foster care. Whether a child is placed in the foster care system by the state taking custody of the child, 33 V.S.A. §§ 640(2), 641, 643, or by the filing of a petition, 33 V.S.A. § 645, the juvenile court must hold a hearing concerning whether the child should remain in the system, 33 V.S.A. § 654. If this hearing results in a finding that the foster child is a delinquent or in need of care and supervision, the court then holds a third hearing, within thirty days of the original finding. 33 V.S.A. § 655. At this time, the court may terminate parental rights as an aspect of the plan for disposition of the child. 33 V.S.A. § 656(a)(3). Unlike other states, the termination of parental rights in Vermont occurs *after* the child has

been placed in the foster care system. Termination of parental rights is merely one finding that a court may make at a dispositional hearing, *albeit* not one favored under Vermont statutory law. *See, e.g.*, 33 V.S.A. § 631(a)(3). Termination of parental rights, rather than taking place at the onset of a foster care placement, is part of the disposition of the child. It comports with neither the federal statute nor common sense to require an additional initial dispositional hearing.

The Secretary further determined that Vermont statutes did not require a "face-to-face" dispositional review hearing. Even though the federal statute required no such hearing, Vermont moved expeditiously to require face-to-face hearings due to administrative action. Later from McLeod to Briggs, December 13, 1983; Record, p. 77. Foster care children received face-to-face hearings in the fiscal year of 1981. *Id.*

None of the different grounds advanced by the Secretary at different times and at different levels of review support a determination of ineligibility of the State of Vermont for excess fiscal year 1981 Section 627 funds. As of this date, almost four years have passed since the federal government first declared Vermont *eligible* for these funds. Since that time, the Secretary has sought—rather desperately—to establish some basis for taking back the funds already received and properly spent by the State of Vermont. Rather than appreciate the positive steps that Vermont has taken to serve better some of her least-favored citizens, the Secretary has twisted the law to try to deprive these children of funds to which they are entitled.

The motion of plaintiff State of Vermont Department of Social and Rehabilitation Services for summary judgment is GRANTED. The motion of defendant United States Department of Health and Human Services is DENIED. The decision of the GAB concerning the ineligibility of Vermont for Section 627 funds is RE-

VERSED because the decision was arbitrary, capricious and not in accordance with law. The reasons for non-compliance relied upon by Acting Commissioner of ACYF Biggs in her August 12, 1983 decision are also REVERSED as arbitrary, capricious and not in accordance with law. The State of Vermont has complied with the mandates of Section 627 requiring implementation of state level procedures regarding foster care children.

SO ORDERED.

Dated at Rutland in the District of Vermont this 28 day of August, 1985.

/s/ Franklin S. Billings, Jr.
FRANKLIN S. BILLINGS, JR.
District Judge

APPENDIX E

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

DATE: June 27, 1984

SUBJECT: Vermont Department of Social and Rehabilitation Services
Docket No. 83-196
Decision No. 546

DECISION

The Vermont Department of Social and Rehabilitation Services (State) appealed a determination by the Acting Commissioner, Administration for Children, Youth and Families, Office of Human Development Services (Agency) that the State was ineligible for fiscal year 1981 funds under section 427(a) of the Social Security Act (Act). That section provides that a state may receive additional funds for child welfare services, beyond the amount available to each state under section 420 of the Act,[1] of the state meets certain requirements for the protection of children in foster care. In September 1981, the Agency approved the State's request for additional funds based on a written certification by the State that it met the requirements of section 427.[2] However, following a review conducted in June 1982 to validate the State's self-certification, the Agency advised the State that it was ineligible for fiscal year 1981 funds since it

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[1] The additional funds are a proportional share of the amount appropriated for title IV-B which exceeds $141,000,000.

[2] The amount of funds awarded to the State is not specified in the record.

did not have appropriate procedures for dispositional hearings required by the Act.[3]

For the reasons discussed below, we sustain the Agency's determination that the State was ineligible for the section 427 funds awarded for fiscal year 1981.

Applicable Law

As one of the conditions for the receipt of additional child welfare funds, section 427(a)(2)(B) requires that the State have implemented and be operating to the satisfaction of the Secretary—

> A case review system (as defined in section 475(5)) for each child receiving foster care under the supervision of the State. . . .

Section 475(5) provides that—

> (5) The term "case review system" means a procedure for assuring that—
>
> (A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,
>
> (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to de-

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[3] The State noted on appeal that the Agency had not raised certain objections to the State's provisions for dispositional hearings until nine months after the close of fiscal year 1981. (State's reply brief dated March 27, 1984, p. 8) To the extent that this was intended as an argument that the Agency's objection came too late, we note that the Board has held that it was reasonable for the Agency to award section 427 funds based on states' self-certifications and to verify the self-certifications at a later date. (Ohio Department of Public Welfare, Decision No. 472, October 31, 1983, pp. 6-7)

termine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship, and

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

Agency's Findings

The Agency evaluated states' compliance with section 427 on two levels. First, the Agency determined whether a state had established policies or procedures for implementing the requirements of the statute. Second, the Agency reviewed a sample of case records to determine

whether these policies or procedures were operational. If a state failed to establish a requirement as a matter of policy, or, in fiscal year 1981, if the state did not comply with the applicable requirements in at least 66% of the cases sampled, the Agency required the return of the section 427 funds.

For fiscal year 1981, the State was found in compliance in 70% of the cases sampled. (State's brief dated January 9, 1984, p. 4) However, the Agency found that the State failed to establish appropriate policies and procedures in three respects. (Full compliance in a particular case was possible despite the State's failure to have policies providing for all required safeguards, since a child may not have been in foster care long enough to require every safeguard.)[4] First, the Agency found that the State did not require dispositional hearings for children with respect to whom parental rights had been terminated and who were placed in the custody of the State, even though those children remained in foster care. (These children will be referred to as TPR children.) Second, the Agency found that the State did not require that dispositional hearings be held within 18 months of the original placement of each child in foster care under the supervision of the State. Third, the Agency found that the State did not require dispositional hearings in the event that no party requested a hearing. (State's appeal file, Exhibit 10)

Dispositional Hearings for TPR Children

Section 475(5) requires an initial dispositional hearing no later than 18 month after the child's original place-

[4] The State argued that it should not have been found out of compliance as a matter of policy where its percentage of compliance in the case record review may have been higher than that of other states found eligible for fiscal year 1981 funds. (State's brief dated January 9, 1984, p. 24) However, in our view, the State's standing in the case record review relative to other states is irrelevant where the other states met the threshold level of compliance set by the Agency.

ment in foster care and hearings "periodically thereafter" during the continuation of foster care. The State alleged that it provided both initial dispositional hearings and subsequent periodic hearings for TPR children. (State's brief dated January 9, 1984, pp. 15-16) We find that the State clearly failed to meet the requirement for periodic dispositional hearings after the initial dispositional hearing in the case of TPR children. Accordingly, we do not reach the discrete issue of whether the State met the requirement for initial dispositional hearings for TPR children. (The State did not explain, and we see no basis for, its argument that the alleged frequency of dispositional hearings prior to the termination of parental rights should be considered in determining whether there were adequate provisions for subsequent periodic dispositional hearings. (See State's reply brief dated March 27, 1984, pp. 6-7))

The State contended that it fulfilled the requirement for periodic dispositional hearings for TPR children in several ways. First, the State alleged that provisions in State law (15 V.S.A., Ch. 9, section 431 *et seq.*) for a hearing in the probate court to determine whether to approve a specific proposed adoptive placement met this requirement of the Act. Second, the State alleged that State law (33 V.S.A. 659) permitting a juvenile court judge at his discretion to continue to hold dispositional hearings (which pursuant to 33 V.S.A. 658 are mandatory every 18 months[5] where parental rights are not terminated) after the termination of parental rights also met this statutory requirement. (State's brief dated January 9, 1984, p. 9)

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[5] Section 658(a) originally required hearings for other than TPR children at two-year intervals and was amended effective May 3, 1982 to require hearings at 18-month intervals. The State asserted, however, that on July 28, 1981 it instituted a policy to hold these hearings at 18-month intervals. (State's brief dated January 9, 1984, p. 8)

We agree with the Agency, however, that these provisions of State law did not afford TPR children in foster care the required protections. The State did not dispute that no probate court hearing would be held unless an adoptive placement was actually proposed nor did the State dispute that periodic reviews in juvenile court were held only if the judge so decided. Even in the event that the juvenile court judge decided to continue to conduct reviews, the State acknowledged that such reviews need not be held on a regular basis. (State's brief dated January 9, 1984, p. 15, as corrected by State's letter dated March 28, 1984) The failure to provide for regularly scheduled juvenile court reveiws is also evident from the language of section 659(a), which provides in pertinent part that "[a]n order of the court may . . . be amended, modified, set aside or terminated by that court at any time upon petition therefor by a party or on its own motion on the ground that changed circumstances so require in the best interests of the child." It is clear from the use of the word "periodically" in section 475(5)(C) of the Act that a state must provide for hearings held at regularly recurring intervals. It is not sufficient that in practice each child might have had dispositional hearings subsequent to the initial one or that such hearings might have taken place on a regular basis [6] since section 475(5) of the Act requires procedures "assuring" that each child will be afforded the protections detailed in that section. The provisions of State law relied on by the State do not assure a TPR child in foster care of periodic dispositional hearings.

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[6] Regulations issued in 1983 implementing section 427 require that "the dispositional hearing must take place within 18 months of the date of the original foster care placement and within reasonable, specific, time-limited periods to be established by the State." 45 CFR 1356.21(e). The adoption of this requirement arguably indicates that the Agency saw some ambiguity, which it sought to clarify, in the language of section 475(5)(c) mandating hearings "periodically thereafter." However, it is clear in any event that the provisions of State law relied on here were not adequate in that they did not require any further hearings.

The State also argued that administrative reviews conducted by the State at six-month intervals pursuant to section 475(5)(B) (which the State continued to hold after the termination of parental rights) satisfied the requirement for periodic dispositional hearings following the initial dispositional hearing. Specifically, the State contended that "a decision by the juvenile court to refrain from holding discretionary § 659 hearings for a TPR child can reasonably be construed to amount to approval of the results of the administrative hearings held at six months intervals." (State's reply brief dated March 27, 1984, p. 7) This argument does not account for the possibility that the juvenile court judge may instead choose to conduct hearings himself pursuant to section 659. As discussed above, this would not fulfill the requirement for periodic dispositional hearings. Even disregarding that defect, however, we are not persuaded that the situation described by the State fulfills the statutory requirement for a dispositional hearing "in a family or juvenile court or another court . . . of competent jurisdiction, or by an administrative body appointed or approved by the court . . ." since the State presented no evidence of any appointment or approval by the juvenile court authorizing the State to conduct dispositional hearings. There is no indication in the record that the juvenile court judge was required to make, or even as a matter of practice made, any formal determination not to continue review hearings for a TPR child. Such a determination, depending upon its content, might arguably be regarded as an appointment of the State to hold dispositional hearings. (However, judicial approval simply of the results of the State's six-month administrative reviews would not be sufficient since section 475(5)(c) requires approval of an "administrative body" to conduct dispositional hearings.) We see no basis for implying merely from the absence of further review by the juvenile court judicial approval of the State to conduct dispositional hearings. The State noted, without further discussion, that the six-month reviews were

subject to quasi-judicial and judicial appeals. (State's brief, pp. 10, 16) However, the opportunity for a judicial appeal following the review clearly fails to satisfy the requirement for judicial approval of the State to conduct the review (if indeed this was the State's intended argument).

Both the State's six-month reviews and the section 659 hearings held by the juvenile court, as well as the probate court hearings, may also fall short of satisfying the periodic dispositional hearing requirement since it appears that neither the State nor the courts had authority to make all the determinations specified in the Act. Section 475(5)(c) states, *inter alia*, that the "hearing shall determine the future status of the child (including . . . whether the child . . . should be placed for adoption . . . ." The State indicated, however, that the probate court must approve adoptive placements, which would seem to preclude the State or the juvenile court from making a determination in this regard. Conversely, the probate court's authority may have been limited to approving adoptive placements, precluding it from determining whether a child "should be continued in foster care for a specified period . . . or . . . on a permanent or long-term basis . . . ." In addition, since 33 V.S.A. 659 provides that the juvenile court may modify its previous order with respect to a child's status, this may mean that the State could not make any determinations affecting the child's status which were within the court's jurisdiction.

The State argued in addition that the Agency's finding of ineligibility should not be sustained because "the statute does not clearly spell out the standards which form the basis of the . . . non-compliance action . . . ." (State's Brief dated January 9, 1984, p. 13) The State quoted in this connection a December 13, 1983 letter in which the Assistant Secretary for Human Development Services stated that the statute was unclear and that the Agency had agreed to "base the compliance reviews on reasonable

State interpretations of the statute." (*Id.*) We are not persuaded, however, that the statute can reasonably be interpreted to allow the system described by the State to fulfill the dispositional hearing requirement with respect to TPR children. It is clear in this case that the State deviated from this requirement since there was no assurance that periodic hearings would be conducted by a court following the initial dispositional hearing, since there was no court appointment or approval of an administrative body to conduct such hearings, and since authority to make all required determinations appears to have been lacking. Any ambiguity in the application of this requirement on different facts, or (for the reason noted below) with respect to other provisions of section 427, is not relevant here.

Accordingly, we conclude that the State failed to provide procedures for assuring periodic dispositional hearings for TPR children. In light of this conclusion, we need not address whether there was any basis for the other Agency findings (i.e., that initial dispositional hearings were not held within 18 months of placement, and that dispositional hearings were not required where not requested by a party) on which the determination of ineligibility was based.

Unequal Enforcement of Section 427 Requirements

The State also argued on appeal that the Agency did not enforce section 427 requirements in the same manner with respect to all states. Specifically, as relevant here, the State asserted that 22 other states failed to hold dispositional hearings at clearly defined time periods for either particular categories of or all children in foster care, and that of these 22 states, 18 were found by the Agency to be eligible for fiscal year 1981 funds. (State's letter dated May 10, 1984, Exhibit A, p. 2)[7] The State argued that

[7] The Agency indicated that it saw no need to comment specifically on the truth of the State's assertion with respect to each state

unequal enforcement of the section 427 requirements was evidence of the lack of a clear program-wide policy and that the finding of non-compliance as to it should be reversed on this basis. The State also argued that the constitutional rights of due process and equal protection were denied to children in the State, who were unfairly deprived of child welfare services on the basis of an enforcement action which was inconsistent with the action taken with respect to other states. (State's brief dated January 9, 1984, pp. 24-25)

Even assuming that the State was treated differently from other states, however, we conclude that that fact would have no impact on this appeal. As discussed above, we find here that the State failed to meet the requirement for periodic dispositional hearings in the case of TPR children since there was no provision for regularly recurring hearings conducted by a court and there was no court approval of an administrative body to conduct such hearings. This constitutes a clear violation of a statutory requirement which, given the facts of this case, is unambiguous. If the statutory requirement at issue were not clear, it might be proper to consider whether the Agency had adopted an interpretation with respect to other states which should have been applied to the appellant. However, to argue that unequal enforcement is evidence that the requirement at issue is unclear stands things on their head.[8]

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involved since the facts were in its view irrelevant. However, the Agency did assert generally that there were some errors in the State's analysis of how different states were treated. (May 31, 1984 telephone conference call, statement of Agency counsel) As indicated below, we do not rule here on whether the State was treated differently from other states with respect to the requirement for periodic dispositional hearings in the case of TPR children with which we have found the State failed to comply.

[8] Even if the statute were unclear, proof that some other states with provisions comparable to this State's for dispositional hearings were found eligible for fiscal year 1981 funds might not be

Thus, while we do not condone any failure by the Agency to enforce this statutory requirement in other appropriate cases, we think any such failure is irrelevant here. The Board is bound by all applicable laws and regulations. 45 CFR 16.14. Where reversing the Agency's adverse determination would be in conflict with the statute under any reasonable reading, the Agency's alleged failure to enforce the statute consistently is insufficient as a basis for reversal.

We agree with the Agency, moreover, that the constitutional rights of children in the State were in no way violated by the Agency's determination that the State was ineligible for the section 427 funds. It was the State's failure to provide all the procedural safeguards required by section 427 which rendered the State ineligible for the funds and the funds unavailable for additional child welfare services. The fact that children in other states may have benefited from the expenditure of funds for which those states may not have been eligible has no bearing on the situation of this State's children. (We note in any event that the children would not have been affected in fiscal year 1981 by the Agency's finding of non-compliance for that year since the fiscal year 1981 funds were apparently spent by the State before the Agency's determination was made.)

It is arguable that if the Agency had discretion to waive the statutory requirement at issue here, the Board might properly consider whether that discretion was exercised in an arbitrary and capricious manner with respect to the appellant. However, we see nothing in the statute that gives the Agency discretion to excuse the violation of

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sufficient to support a finding that the Agency had adopted an interpretation which should have been applied in this case if still other states were found ineligible for the funds. That situation would not clearly reflect a settled Agency interpretation. However, it might indicate the presence of more than one reasonable interpretation.

a significant statutory requirement, as the State would have it do. At most, the language of section 427 gives the Agency discretion to waive minor violations. (See Ohio Department of Public Welfare, Decision No. 472, October 31, 1983, p. 4)[9] Thus, we cannot say that it was an abuse of discretion for the Agency to have enforced the statutory requirement in question here regardless of any alleged inaction in other states.

The State also argued that the Agency's system for reviewing compliance with section 427 was procedurally defective in that it could potentially result in unequal enforcement. (State's brief dated January 9, 1984, pp. 22-23) However, in light of our conclusion that any disparity in the actual treatment of different states was irrelevant, we need not consider the procedures which may have created this situation.

Estoppel

The State also argued that it was "entitled to prevail on grounds of estoppel. . . ." (State's reply brief dated March 27, 1984, p. 21) Absent any elaboration of the basis for this argument, and in view of the Board's prior clear rulings on this issue, it does not warrant our further consideration. (See, for example, Ohio Department of Public Welfare, *supra*, at pp. 10-11)

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[9] The State in fact argued that its alleged non-compliance was insubstantial since changes made in the State's dispositional hearing procedures which resulted in a finding of eligibility for fiscal year 1982 funds meant that the non-compliance "did not exist long enough to create the 'foster care drift' which the Adoption Assistance and Child Welfare Act seeks to prevent." (State's reply brief dated March 27, 1984, p. 21) However, since the statute authorizes a separate grant of funds for each fiscal year, the degree of funds for each fiscal year, the degree of non-compliance is appropriately judged on the basis of each year's performance and not on the basis of whether the underlying purpose of section 427 was ultimately met.

Conclusion

For the foregoing reasons, we find that the State failed to have appropriate procedures in fiscal year 1981 for periodic dispositional hearings in the case of TPR children in foster care as required by section 475(5)(c) of the Act. Accordingly, we sustain the Agency's determination that the State was ineligible for the section 427 funds awarded for that year.

/s/ Judith A. Ballard
JUDITH A. BALLARD

/s/ Alex G. Teitz
ALEXANDER G. TEITZ

/s/ Norval D. Settle
NORVAL D. (JOHN) SETTLE
Presiding Board Member

APPENDIX F

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a miiltary or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate

in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed

nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law; interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

§ 627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify

If, for any fiscal year after fiscal year 1979, there is appropriated under section 620 of this title a sum in ex-

cess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State—

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary—

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

(b) Reduction of allotment

If, for each of any two consecutive fiscal years after fiscal year 1979, there is appropriated under section 620 of this title a sum equal to $266,000,000, each State's allotment amount for any fiscal year after such two con-

secutive fiscal years shall be reduced to an amount equal to its allotment amount for the fiscal year 1979, unless such State—

(1) has completed an inventory of the type specified in subsection (a)(1) of this section;

(2) has implemented and is operating the program and systems specified in subsection (a)(2) of this section; and

(3) has implemented a preplacement preventive service program designed to help children remain with their families.

(c) Presumption

Any amounts expended by a State for the purpose of complying with the requirements of subsection (a) or (b) of this section shall be conclusively presumed to have been expended for child welfare services.

(Aug. 14, 1935, c. 531, Title IV, § 427, as added June 17, 1980, Pub.L. 96-272, Title I, § 103(b), 94 Stat. 519.)

§ 675. Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672 (a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents'

home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the amounts of the adoption assistance payments and any additional services and assistance which are to be provided as part of such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move to another State while the agreement is effective.

(4) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(5) The term "case review system" means a procedure for assuring that—

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship, and

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circum-

stances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

(Aug. 14, 1935, c. 531, Title IV, § 475, as added and amended June 17, 1980, Pub.L. 96-272, Title I, §§ 101(a)(1), 102(a)(4), 94 Stat. 510, 514.)

§ 658. Limitation of time on orders of disposition

(a) Unless otherwise specified therein an order under the authority of this chapter transferring legal custody, or guardianship over the person or residual parental rights and responsibilities of a child to an individual, agency, or institution shall be for an indeterminate period, and provided further that, every order transferring legal custody or guardianship over the person shall be reviewed two years from the date entered and each two years thereafter. In no event shall any such order remain in force or effect beyond a person's twenty-first birthday.

(b) Any person to whom legal custody or guardianship over the person has been transferred shall thereafter file a notice of biennial review with the court before whom such proceeding was held, the state's attorney having jurisdiction, and all parties to the proceeding, and, in addition, shall file with such court and such state's

attorney a report and recommendation. Service upon a party of such notice shall be effected by mailing a copy thereof to his last known address. Failure to give such notice or to review an order shall not terminate the original order or limit the court's jurisdiction.

(c) Within 20 days of such notice, any such party may file a request for a hearing with the court, or the court on its own motion may order a hearing. Within 30 days after any such request or order, a hearing shall be held for the purpose of considering the review of the order of disposition, which hearing shall be held in all respects as a hearing on a petition under this chapter, except that in such a hearing, all evidence helpful in determining the questions presented, including oral and written reports, may be admitted and relied upon to the extent of its probative value, even though not competent in a hearing on a petition. In the event that no such hearing is requested or ordered, an order shall be deemed reviewed within the meaning of subsection (a), and shall remain in force for a period of two years after the expiration of the time within which a hearing could have been requested, without the entry of an additional order.

(d) This section shall apply to all orders in force and effect on July 1, 1973, and all orders issued thereafter. Any order in force on July 1, 1973, shall be deemed entered on that date for purposes of section 658 of Title 33, providing that a biennial review may be initiated by an agency as provided hereunder, at any time after two years from the date of actual entry of any order in force on July 1, 1973.—167, No. 304 (Adj. Sess.), § 28, eff. July 1, 1968; amended 1969, No. 289 (Adj. Sess.), § 4; 1973, No. 57; 1981, No. 1 (Sp. Sess.), § 9, eff. July 17, 1981.

§ 659. Modification or vacation of orders

(a) An order of the court may be set aside by a subsequent order of this court or, upon appeal from a denial

thereof by that court, by a court upon appeal therefrom, when it appears that the initial order was obtained by fraud or mistake sufficient therefor in a civil action, or that the court lacked jurisdiction over a necessary party or of the subject matter, or that newly discovered evidence so requires. An order of the court may also be amended, modified, set aside or terminated by that court at any time upon petition therefor by a party or on its own motion on the ground that changed circumstances so require in the best interests of the child. An order granting probation to a person found to be delinquent may be revoked and any other disposition made under the authority of this chapter on the ground that the conditions of probation have been observed. A petition alleging a delinquent act may not be amended to allege that a child is in need of care or supervision and a child who has been adjudged a delinquent child as a result of a petition alleging delinquency may not be subsequently adjudged a child in need of care or supervision unless a separate petition alleging that the child is in need of care or supervision is filed.

(b) Any party to the proceedings, and any person having supervision or legal custody of or an interest in the child may petition the court for the relief provided in this section. The petition shall set forth in concise language the grounds upon which the relief is requested. Any order under this section shall be made after notice and hearing as in the case of a petition filed under section 644 of this title, except that in such hearing under this section, all evidence helpful in determining the questions presented, including oral and written reports, may be admitted and relied upon to the extent of its probative value, even though not competent in a hearing on the petition. After such hearing, the court shall deny or grant such relief as the evidence may warrant, consistent with the provisions of this chapter.—1967, No. 304 (Adj. Sess.), § 29, eff. July 1, 1968; amended 1969, No. 289

(Adj. Sess.), § 5; 1973, No. 246 (Adj. Sess.), § 16; 1981, No. 1 (Sp. Sess.), § 10, eff. July 17, 1981.

§ 440. Trial period

(a) Except as otherwise provided in this section a final decree of adoption of a minor shall not be issued until such minor has lived for a trial period of six months in the home of the adopting parent or parents under the supervision of the department of social and rehabilitation services or a licensed child placing agency.

(b) The department or the agency making the report specified in section 437 of this title shall provide services and give supervision to the child in the foster home, visiting such home as often as may be considered necessary, and at the expiration of such trial period shall make a further report with recommendations thereon to the probate court.

(c) In the event that such supervision, or further supervision, is not deemed necessary, the department or agency may at any time file a final report and recommend that a hearing on the adoption be held and final action taken forthwith.

(d) When such trial period has elapsed prior to the filing of the petition, the report filed in accordance with the provisions of section 437 of this title may, if it is so recommended therein, be treated as the final report.

(e) If the probate judge in whose court the petition is filed, is of the opinion, based upon evidence of the conditions and circumstances attending the proposed adoption, that supervision or further continuance thereof should not be required, and that a hearing on the adoption should be held and final action taken forthwith, he may at any time so certify in writing, setting forth in such certificate the facts on which such opinion is based, and shall thereupon transmit a copy of such certificate to the department of social and rehabilitation services

and to any licensed agency which has made such investigation or given such supervision with respect to the proposed adoption.—Amended 1973, No. 152 (Adj. Sess.), § 4, eff. 30 days from March 15, 1974.

§ 441. Notice of hearing

After the expiration of such trial period, or after receipt of a recommendation or filing of a certificate for immediate hearing in accordance with the provisions of the preceding section, the court shall set a date for a hearing on the proposed adoption and cause written notice thereof to be given, either by delivery in person or by mail addressed to his last known address, to each person or agency signing the petition for adoption, to the department of social and rehabilitation services and to the living natural parents of the minor to be adopted; provided, however, that such notice shall not be given to the parent or parents when the minor has been committed to the care and custody of the department of social and rehabilitation services or a licensed child placing agency by a court of this state without limitation in respect to adoption, or has been relinquished to a licensed child placing agency in accordance with law, nor shall such notice be given to the natural father when the minor was not born in lawful wedlock or when, though the minor was born to a woman living in lawful wedlock, the husband of such woman is claimed not to be the father of such minor, unless in either case the parents of such minor have intermarried and such father has recognized such minor as his child and is contributing to the support of such minor; and provided further that the court may withhold such notice from the presumptive father when the minor was born to a woman living in lawful wedlock if the court, in a preliminary ex parte hearing, finds beyond a reasonable doubt that such presumptive father, by reason of nonaccess is not the father of such minor and is of the opinion that withholding of such notice will better serve the welfare, considered in the

aggregate, of the minor and the other persons interested. If the court is not satisfied that a parent entitled thereto has received actual notice regarding the proposed adoption it may continue the hearing and order that notice thereof be published for three weeks successively in a newspaper having general circulation in the district where such parent last resided, or in the district in which the proceedings are pending.—Amended 1973, No. 152 (Adj. Sess.), § 4, eff. 30 days from March 15, 1974.

§ 442. Hearing

At such hearing, the court shall receive such evidence as may be produced by and interested party and at the conclusion thereof shall determine from the investigation made, if any, and the report and recommendations submitted and from the evidence presented whether the petition should be granted. Where the department of social and rehabilitation services or a licensed child placing agency seeks to execute the adoption decree on behalf of the minor by virtue of an order of commitment by court or of a written relinquishment or surrender, such department or agency shall file with the probate court a certified copy of such order of commitment or such written instrument or a copy thereof certified by the clerk or secretary of the agency.—Amended 1973, No. 152 (Adj. Sess.), § 4, eff. 30 days from March 15, 1974.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to

the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(As amended Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub. L. 96-486, § 2(a), 94 Stat. 2369.)

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.)

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, c. 646, 62 Stat. 963.)

No. 86-745

In the Supreme Court of the United States

OCTOBER TERM, 1986

VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, PETITIONER

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory foster-care procedures adopted by the State of Vermont comport with the requirements of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 *et seq.*, and thus entitle the State to certain federal foster-care funds for fiscal year 1981.

2. Whether the court of appeals erred in failing to remand to the district court certain claims raised by petitioner that were not resolved by the district court in reaching its decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 798 F.2d 57. The opinion of the district court (Pet. App. 20a-32a) is unreported. The opinion of the Grant Appeals Board (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1986. The petition for a writ of certiorari was filed on November 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (the Act), Pub. L. No. 96-272, 94 Stat. 500 *et seq.*, "[i]n response to demonstrated inadequacies in our nation's system of foster care" (Pet. App. 4a-5a). The Act provided the states with financial incen-

tives to establish a more "active and systematic monitoring of children in the foster care system" (Pet. App. 5a) in order to prevent children from becoming "lost" or "stranded" through bureaucratic inattention. Congress provided these incentives by amending Title IV-B of the Social Security Act (42 U.S.C. (& Supp. II) 620-628), which provides funds to the states for the improvement of child welfare services, and by creating a new Title IV-E program (42 U.S.C. (& Supp. II) 670-676) to reimburse states for foster care maintenance and adoption assistance.

In amending Title IV-B, Congress authorized annual appropriations of $266 million. Of this amount, each state was to receive a proportionate share of an initial $141 million appropriation. In order to qualify for any funds appropriated in excess of $141 million (so-called "excess funds"), a state was obliged to certify, inter alia, that it "has implemented and is operating to the satisfaction of the Secretary * * * a case review system * * * for each child receiving foster care under the supervision of the State." 42 U.S.C. 627(a)(2)(B); see Pet. App. 5a. As relevant here, the central feature of this "case review system" requires participating states to provide so-called "dispositional hearings" for "each child in foster care under the supervision of the State" (42 U.S.C. 675(5)(C)). The objective of these judicial or quasi-judicial hearings is to "determine the future status of the child" and thus to prompt a final decision concerning the foster child's long-term placement (*ibid.*).[1]

[1] In pertinent part, the statute requires that each state adopt procedures for assuring that (42 U.S.C. 675(5)(C)):

> with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen

On December 31, 1980, the Secretary of Health and Human Services published interim regulations governing state compliance with the statutory scheme described above. 45 Fed. Reg. 86817. These interim regulations were later withdrawn (46 Fed. Reg. 14895 (1981)) and final regulations were not published until May 23, 1983 (48 Fed. Reg. 23118). To fill this regulatory gap, HHS advised the states that they could submit a certificate of self-compliance with Section 627 in order to qualify for a share of excess funds for fiscal year 1981, the first year for which the Act was applicable. Pet. App. 8a, 24a.

> months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) * * *.

In introducing the Senate version of the bill (125 Cong. Rec. 22685 (1979)), Senator Cranston made clear why these "dispositional hearings" were essential:

> One of the prime weaknesses of our existing foster-care system is that, once a child enters the system and remains in it for even a few months, the child is likely to become "lost" in the system. Yearly judicial reviews of the child's placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child's future placement should be. * * * This provision requiring a dispositional hearing after a child has been in foster care for a specific period of time should assist States in making the difficult, but critical, decisions regarding a foster child's long-term placement.

See also *Lynch* v. *King*, 550 F. Supp. 325, 335 (D. Mass. 1982) ("Periodic review * * * is designed to ensure that the plan for the foster child is adapted to changing circumstances. It is designed to ensure that, in light of current conditions, the child's placement in foster care continues to be necessary and appropriate to his or her needs.").

2. On July 29, 1981, petitioner certified that it was in compliance with the Act and that it was eligible for excess funds. The Acting Commissioner of the Administration for Children, Youth and Families (ACYF), a subdivision of HHS, initially accepted that self-certification. Petitioner accordingly received $346,872 in excess funds for fiscal year 1981. Pet. App. 8a.

In April 1982, all states, including Vermont, were informed that their self-certifications would be subject to verification by the ACYF to assure compliance with the Act. As a result of that review, the ACYF determined that petitioner was not in compliance. In relevant part, the ACYF found that petitioner did not guarantee periodic dispositional hearings—mandated by Section 675(5)(C)—for children whose parents had had their parental rights terminated (so-called "TPR children"). Pet. App. 9a.[2]

Petitioner appealed the ACYF's decision to the HHS Department Grant Appeals Board. The Board affirmed the agency's decision, holding that petitioner was ineligible for excess funds for fiscal year 1981 (Pet. App. 33a-45a). The Board determined that petitioner's foster-care procedures did not satisfy the requirements of 42 U.S.C. 675(5)(C), which mandate periodic dispositional hearings for all children in foster care, including TPR children (Pet. App. 36a-41a). Concluding that petitioner's procedures fell short of the federal mandate in that respect, the Board did not address the other two grounds relied on by the ACYF in finding petitioner ineligible for excess funds (Pet. App. 41a).[3]

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[2] The ACYF also noted two related deficiences in petitioner's procedures: first, that petitioner did not require that a dispositional hearing be held within 18 months of the original placement of each child in foster care; and second, that petitioner did not require a dispositional hearing in the event that no party requested a hearing. Pet. App. 36a.

[3] The Board also rejected (Pet. App. 41a-44a) petitioner's claim that the ACYF had discriminated against the State by finding 18 other

3. Petitioner filed this action in the United States District Court for the District of Vermont seeking to set aside the Board's decision. The district court reversed (Pet. App. 20a-32a). It held, first, that a Vermont foster care statute, Vt. Stat. Ann. tit. 33, § 658 (b) (Supp. 1985), satisfied the procedural requirements of federal law, even though prior to 1982 the Vermont statute provided for dispositional hearings only biennially, rather than within 18 months of the child's original placement in foster care, as the federal statute requires (Pet. App. 29a). The district court appeared to acknowledge that the Vermont statute did not require dispositional hearings for TPR children after the termination of parental rights, but the court held that this was not a violation of the Act. According to the district court, in Vermont the termination of parental rights is itself a dispositional hearing; the court reasoned that "[i]t comports with neither the federal statute nor common sense to require an additional initial dispositional hearing" (Pet. App. 30a-31a). Without reaching petitioner's "estoppel and equity" claims (*id.* at 30a), the court concluded that "HHS possesse[s] no expertise with regard to Vermont law" and held that it must "strip away the veneer of agency expertise that normally adheres to federal agency action" (*id.* at 29a).[4]

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states eligible for funds even though they purportedly had also failed to provide the required dispositional hearings. The Board held that "[e]ven assuming that the State was treated differently from other states," that fact could not excuse petitioner's "clear violation of a statutory requirement" (*id.* at 42a). The Board likewise rejected (*id.* at 44a) petitioner's contention that the government was estopped from recouping the excess funds from petitioner. It noted that petitioner had failed to "elaborat[e] * * * the basis for this argument" (*ibid.*).

[4] The court also rejected as "arbitrary, capricious and wrong" the other two deficiencies identified by ACYF in the State's foster-care procedures (Pet. App. 30a).

The court of appeals unanimously reversed (Pet. App. 3a-17a). It held, first, that the district court's reliance on Vt. Stat. Ann. tit. 33, § 658(b) (Supp. 1985) was error because "the Vermont statute simply does not apply to TPR children, and therefore falls short of the federal mandate that *every* child in foster care receive a periodic dispositional hearing" (Pet. App. 11a (emphasis in original)). The court noted that petitioner itself had conceded in the district court that the hearings provided by the Vermont statute were purely discretionary for TPR children, whereas the federal statute "is clear in extending to '*each* child in foster care under the supervision of the State' the protection of periodic dispositional hearings" (Pet. App. 13a, quoting 42 U.S.C. 675(5)(C) (emphasis in original)). The court also rejected the district court's assumption that the hearing accompanying the termination of parental rights was itself a sufficient "dispositional hearing" for purposes of the federal statute. The court observed that the district court's assumption "misperceives the very purpose of the Act, *viz.*, to assure all children periodic hearings until a *final* disposition is effected. Since the mere termination of parental rights does not serve to remove a child from the foster care system, [the district court] erred in concluding that TPR children required no further dispositional hearings." Pet. App. 14a-15a. Finally, the court rejected petitioner's contentions that its state adoption procedures, six-month case reviews, and discretionary hearings for TPR children satisfied the "dispositional hearings" requirement of the Act.[5] The court reversed the judgment of the district court and remanded

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[5] The court noted (Pet. App. 15a) that Vermont's adoption procedures do not furnish any hearing unless and until adoption proceedings have actually commenced. "Clearly, TPR children who are not fortunate enough to be considered for adoption never will receive such a hearing." The court also held that Vermont's six-month case reviews are not "dispositional hearings" within the meaning of the federal law, since they are nonjudicial proceedings that lack procedural protec-

with instructions to enter an order affirming the Board's decision (Pet. App. 17a).[6]

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. Petitioner does not seriously dispute the central determination of the court of appeals: that in 1981 petitioner did not provide for TPR children the "dispositional hearings" that are required by federal law as a condition to the receipt of excess funds. The Act by its terms requires dispositional hearings—for all children—throughout the period of their stay in foster care under the state's supervision. The language of 42 U.S.C. 675(5)(C) is broadly in-

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tections for the child (*ibid.*). Finally, the court rejected the claim that the decision of a juvenile court to refrain from holding a discretionary hearing for TPR children under Vt. Stat. Ann. tit. 33, § 659 (1981) should be regarded as "tacit approval of the results of * * * administrative reviews," thus purportedly obviating the need for the formal dispositional hearings required by federal law (Pet. App. 15a-17a).

[6] The court of appeals did not explicitly address the so-called "equitable" claims to which petitioner devotes much of its petition, namely, the allegations that the government had applied an "ex post facto" legal standard in denying excess funds to Vermont (Pet. 6, 8); that the government had discriminated against Vermont in relation to its treatment of similarly situated states (*id.* at 9-10); and that the government should be estopped from seeking to recoup the funds (*id.* at 10). In its opening brief in the court of appeals, petitioner did not address the merits of any of these issues, referring to them in a single paragraph that asked the court of appeals to remand the issues for further consideration by the district court. Petitioner offered no reasons why it believed its arguments to be meritorious and thus that a remand was appropriate. See C.A. Br. 26-27. The court of appeals thereafter requested supplemental briefing on the estoppel issue; only then did petitioner advance any purported basis for that claim. At no time did petitioner address in the court of appeals the merits of its "ex post facto" and "discrimination" claims.

clusive, requiring "with respect to each [foster] child" a "dispositional hearing to be held * * * no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care)." There is no exception for TPR children, and a court is not free to find an exception where none is prescribed. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978); *Aaron* v. *SEC*, 446 U.S. 680 (1980); *Atwell* v. *MSPB*, 670 F.2d 272, 286 (D.C. Cir. 1981). Contrary to the district court's statement (Pet. App. 31a), moreover, an exception for TPR children is not supported by "common sense." Notwithstanding a termination of parental rights, the foster child remains in a temporary foster-care situation, and Congress's objective in requiring dispositional hearings was to remove the child from that status *either* by reuniting him with his parents *or* by placing him with adoptive parents or in some other permanent arrangement. See Pet. App. 13a.[7]

Rather than assert that TPR children are not covered by the Act (a claim that it advanced without success in the court of appeals (Pet. App. 14a)), petitioner contends (Pet. 11) that Vermont's procedures with respect to TPR children satisfy the federal requirements. But as petitioner itself conceded in the district court (*ibid.*), the hearings provided by Vt. Stat. Ann. tit. 33, § 658 (Supp. 1985) are discretionary, not mandatory, for TPR children. And the other Vermont procedures offer at best "an opportunity" (*ibid.*) for additional hearings and thus fail to provide

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[7] As the court of appeals pointed out (Pet. App. 14a), a 1984 study prepared by the American Bar Association emphasized that "[c]hildren who are still in foster care following termination of parental rights" are "entitled to a dispositional hearing under the explicit language of the act," since, until they are "actually placed for adoption or guardianship, they are still in state supervised foster care." 3 ABA, *Comparative Study of State Case Review System Phase II: Dispositional Hearings* 2-45 (1984).

TPR children with the procedural protections envisioned by the federal statute. The Act by its terms requires *mandatory* dispositional hearings, stating plainly that "procedural safeguards *will be applied* * * * to assure each child in foster care under the supervision of the State of a dispositional hearing * * *." 42 U.S.C. 675(5)(C) (emphasis added).

Finally, petitioner asserts that the federal statute is "ambiguous" (Pet. 5, 10, 11), a conclusion that it appears to draw from the fact that the court of appeals and the district court reached contrary results.[8] We do not find the words "each child" (42 U.S.C. 675(5)(C)) to be ambiguous, and the fact that the district court misconstrued the statute calls for no different conclusion. Cf. *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981) (rejecting the court of appeals' restricted reading of the RICO statute as unwarranted by the plain terms of the act). And even if the statute were thought to be ambiguous, it is hard to see how that would help petitioner. It is well established that, where two interpretations of a statute are equally reasonable, the agency's interpretation should be deferred to. See *United States* v. *Locke*, 471 U.S. 84, 102 n.14 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

2. Petitioner also contends (Pet. 5-10) that the court of appeals "depart[ed] from the accepted and usual course of judicial proceedings" (*id.* at 5) by rejecting its so-called "equitable" arguments sub silentio instead of remanding them to the district court. The arguments to which petitioner refers are its contentions that HHS violated due process by applying a new legal standard retroactively (*id.* at 8-9); that HHS discriminated against petitioner rela-

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[8] Petitioner also asserts that HHS "used multiple interpretations of § 675(5)(C) in reviewing the various state eligibility applications for fiscal year 1981" (Pet. 11-12), but petitioner offers no support for this contention and neither court below alluded to it.

tive to "similarly situated parties" (*id.* at 9-10); and that HHS was estopped to recoup the excess funds distributed to petitioner in 1981 (*id.* at 10). As we have noted (page 7 note 6, *supra*), petitioner failed to devote any substantive discussion to these contentions in its opening brief to the court of appeals, and petitioner discussed only the last contention in a supplemental brief filed at the court of appeals' direction. Petitioner's own briefing strategy thus suggested that the arguments were makeweights, and the court of appeals correctly rejected them without further ado.

While a reviewing court ordinarily will remand issues that were presented to, but not passed on by, the trial court, this principle is not "inflexible" (*Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941)). A court of appeals "has broad power to make any disposition that is 'just under the circumstances' " (*Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (quoting 28 U.S.C. 2106)). Particularly where "[t]he only issue involved * * * is one of law [and] there are no genuine issues of material fact," a reviewing court may resolve questions not decided by the lower court (*Central Hudson Gas*, 587 F.2d at 557-558). Here, the court of appeals correctly chose not to remand for a formal disposition of petitioner's "equitable" arguments since those arguments are plainly meritless.

First, petitioner mischaracterizes as "ex post facto" (Pet. 6) the agency's finding that Vermont was ineligible to receive excess funds in 1981. After preliminarily accepting petitioner's certification that it had complied with the Act, the ACYF undertook its own review of the State's foster-care procedures. That review disclosed that petitioner was, in fact, not providing mandatory dispositional hearings for TPR children, as required by federal law. In reaching that determination, the agency in no sense "retroactively applie[d] a revised standard" (Pet. 8). To the contrary, the "standard" applied by the agency was the standard that

Congress embodied directly in the statute: that, in order to qualify for excess funds, each state must provide "each child" with a "dispositional hearing * * * no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care)" (42 U.S.C. 675(5)(C)). The fact that HHS did not audit petitioner's self-certification until after the 1981 funds had been distributed does not mean that HHS engaged in "ex post facto" decisionmaking.[9]

Second, petitioner offers no support whatever for its assertion that HHS discriminated against Vermont in allocating excess funds for 1981. And even if petitioner had introduced some evidence on that question below, which it did not do, there would be no legal difference. An agency is not free to ignore conceded deficiencies in a state's compliance with federal law simply because other states may have failed in the same or similar ways.

Finally, petitioner's estoppel claim is frivolous. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 (1984) (footnote omitted). While this Court has left open the question

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[9] Petitioner's reliance on this Court's decisions in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and 332 U.S. 194 (1947), is thus entirely misplaced. Those cases stand for the proposition that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (318 U.S. at 87). This case obviously does not present that issue. In initially accepting petitioner's self-certification, the ACYF did not purport to adopt any particular standard from which it later retreated; the agency simply took petitioner at its word, and then discovered in a subsequent audit that petitioner was not in fact in compliance with the foster-care procedures mandated by federal law. To take an analogous example from the tax law, the IRS often audits tax returns that request refunds, even though the requested refunds are typically paid when the returns are initially processed; if the audit reveals a deficiency, the taxpayer must pay the money back.

whether estoppel may ever be raised as a defense in a government enforcement action (see *Community Health Services*, 467 U.S. at 60 & n.12; *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *Montana* v. *Kennedy*, 366 U.S. 308, 315 (1961)), the Court has made clear that a claimant must, at a minimum, identify some "affirmative misconduct" (*INS* v. *Hibi*, 414 U.S. 5, 8 (1973)) or "definite misrepresentation of fact" (*Community Health Services*, 467 U.S. at 59 (citation omitted)) committed by the government. The Court has routinely rejected estoppel claims in the absence of such affirmative misconduct. See, *e.g.*, *Hibi*, 414 U.S. at 8-9. Here, petitioner can point to no affirmative misrepresentations by HHS on which the State relied. The government did not tell petitioner what foster-care procedures to adopt. HHS simply paid funds to petitioner based on its self-certification and then, when an audit revealed that petitioner was in fact out of compliance, sought to recoup the monies erroneously expended. Such government conduct cannot give rise to an estoppel. In any event, as the Court noted in rejecting a similar estoppel claim in *Community Health Services*, petitioner's position did not change for the worse as a result of the HHS audit. All petitioner suffered was "the inability to retain money that it should never have received in the first place" (467 U.S. at 61).[10]

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[10] Petitioner's reliance (Pet. 10) on this Court's decision in *United States* v. *Locke*, 471 U.S. 84 (1985), is misplaced. There, the plaintiffs challenged a federal statute regulating unpatented mining claims. One of their contentions was that a government pamphlet had affirmatively misled them as to the date by which they had to file certain claims required by the statute. This Court remanded to the district court "[w]ithout expressing any view as to whether, as a matter of law, [the claimants] could prevail on [this estoppel] theory" (471 U.S. at 89-90 n.7). The present case involves no affirmatively misleading conduct by the government. This Court's decisions in *Walters* v. *Home Savings & Loan Ass'n*, 467 U.S. 1223 (1984), and *Block* v. *Payne*, 469

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

U.S. 807 (1984), remanding in each instance for reconsideration in light of *Community Health Services,* are inapposite for the same reason. In each of these cases, the government was alleged to have affirmatively misled a party into an adverse change of position. See *Payne* v. *Block*, 714 F.2d 1510, 1512-1513 (11th Cir. 1983); *Home Savings & Loan Ass'n* v. *Nimmo*, 695 F.2d 1251, 1254 (10th Cir. 1982). Significantly, the court of appeals' decisions in the cited cases, each of which was vacated by this Court, had *upheld* estoppel claims asserted against the government. See *Payne*, 714 F.2d at 1518; *Home Savings*, 695 F.2d at 1255.

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No. 86-745 (3)

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES,
Petitioner

v.

UNITED STATES HEALTH
AND HUMAN SERVICES AGENCY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent's Brief In Opposition alleges that Petitioner is not entitled to judicial review of Petitioner's equitable arguments because Petitioner did not seriously pursue the remand remedy before the Second Circuit Court

of Appeals. Respondent's Brief, p. 7, fn. 6. Respondent further alleges that judicial review of Petitioner's equitable arguments is not warranted because Petitioner's equitable arguments are "makeweight" or frivolous efforts which Petitioner never seriously pursued over the various levels of this litigation. Resp. Br., p. 9-10. These two assertions by Respondent, which constitute virtually the entire sum and substance of Respondent's argument against direct Supreme Court review and/or remand to the District Court of Petitioner's equitable theories of relief, totally misrepresent the Record of this case.

Contrary to Respondent's claims, Petitioner fully briefed the legal and factual grounds supporting Vermont's request for remand before the Second Circuit. See, Second Circuit Record, Brief for the Appellee, p. 7, 22-23, 26-27; Supplemental Brief for the Appellee, p. 1-20; Petition for Rehearing and Suggestion that Rehearing be in Banc, p. 1-2,

7-14. Furthermore, most of the 900 page Health and Human Services Agency Grant Appeals Board Record is devoted to factual evidence and legal argument which Petitioner has advanced in support of Petitioner's equitable arguments. Grant Appeals Board Record 1, 31-183, 231-513, 548-889. In addition, the Briefs submitted by Petitioner at every level of this case clearly advance Petitioner's equitable arguments as serious theories of relief.

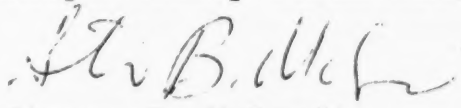
Finally, it should be noted that Petitioner's original eligibility was not determined by mere self-certification as alleged by Respondent. Resp. Br., p. 4, 11. Rather, Petitioner's original eligibility resulted from self-certification and full review and approval of said self-certification by Respondent. Petitioner's Appendix, p. 24a-25a. Consequently, Respondent's arguments against Petitioner's estoppel claims and Respondent's analogy to tax audits

are based on an erroneous assumption and, therefore, are groundless.

CONCLUSION

For the foregoing reasons, Petitioner renews the request for this Court to grant the relief requested by Petitioner in the previously submitted Petition for Writ of Certiorari.

Respectfully submitted,



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